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No. 91-2055

In The

Supreme Court of the United States

October Term, 1992

DOUGLAS DWIGHT BENNETT,

Petitioner,

-vs-

THE STATE OF MICHIGAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Petitioner was charged with Fraudulent Detention or Use of a Building Contract Trust Fund contrary to MCL 570.152 and with being an Unlicensed Contractor contrary to MCL 339.601. Following a jury trial Petitioner was convicted of both the above charges.

Petitioner was sentenced to fines, cost and restitution or, in the alternative, six months in jail and three months in jail on the respective convictions.

The testimony at the trial established that Petitioner agreed to build an addition for the homeowner, John Faulkner. Petitioner prepared a contract, listing the cost of the construction and materials as $20,000.00. Petitioner received $8,000.00 from the victims to buy materials. (T, 65.) Two checks were made out to the Petitioner for $1,000.00 and $7,000.00 on October 4, 1984 and October 8, 1984, respectively. The checks were drawn on Account Number 64-777315 at the National Bank of Detroit. (T, 69-70.) Both checks were cashed by

the Petitioner and used for a cashier's check made out to the Petitioner. (T, 158.)

After beginning work on the project, Petitioner began to abandon the project. When confronted by the victim about having a building permit as required by the City, Petitioner told the victim that they should go together to City Hall. On the way to apply for the permit the Petitioner told Mr. Faulkner that he was not a licensed builder. Further, he had no time to take the necessary steps to obtain his license so that it would be better if the homeowner applied for the permit.

Mr. Faulkner then did apply for a permit but never received the permit. The work became slower and slower, with the Petitioner showing up for an hour and then disappearing. Numerous phone calls were made to the Petitioner, but he never returned any of the calls. (T, 75-76.) Finally, the Faulkners sent a certified letter to the Petitioner on December 7, 1984. Shortly thereafter, there was a meeting at the Petitioner's house where the Petitioner claimed he had problems with the permit. (T, 83.) A second meeting was held between the Petitioner and Mr. Faulkner. At this meeting, the Petitioner promised to complete the job in three weeks or to return the victim's money. This agreement was reduced to writing and signed by the Petitioner. At the trial the agreement was admitted as an exhibit. (T, 84-86.)

While these meetings were taking place, the victim went to City Hall to see if any permits had been pulled. No plans or permits were found. (T, 80.)

Petitioner gave Faulkner a list of the cost of items he had used and material supplied. This, according to the Petitioner, totalled $4,003.00. The Petitioner also told Faulkner that he would refund $4,400.00. (T, 91.) Although, Petitioner never returned any of the money. (T, 92.)

There was testimony that inquiry was made with the State Board of Licensing and Regulation. No record could be found of a builder's license ever having been issued to a builder named Douglas Dwight Bennett.

Petitioner was subsequently convicted by a jury and sentenced. Petitioner appealed as of right to the Michigan Court of Appeals. The Court of Appeals affirmed Petitioner's conviction and sentence. The Michigan Supreme Court denied leave.

REASONS FOR DENYING THE WRIT

I.

THE WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE OF A LACK OF A FEDERAL QUESTION.

Petitioner concedes that "the statute sets forth specific activities deemed criminal, which are easily comprehended by someone in the building construction business." (Petitioner's Writ, p. 19.) The Michigan Court of Appeals, relying on *People* v *Miller*, 78 Mich App 336; 259 NW2d 877 (1977), found:

> After reviewing these provisions, it is apparent to us that the act requires that monies received for a construction project be expended for that project and that any monies paid to a contractor be held in trust for that purpose. Clearly, use of the money for purposes not mentioned in the act would expose the contractor to a criminal penalty. We easily can agree that the act is not vague.

Miller, supra, followed the decision of *People* v *Herron*,[1] 68 Mich App 381 (1976). In *Herron*, it was noted

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[1] ***Herron* did adopt the language from a Federal case. *Lanzetta* v *New Jersey*, 306 US 451; 59 S Ct 618; 83 L Ed 888 (1939). However, the court was not resting its decision on the federal case but merely using the case for guidance.**

that the provision must not be so vague that men of ordinary intelligence must guess at its meaning. The statute provides:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefor, of any payment made to him, for any other purpose than to first pay laborers, subcontractors and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.
>
> MCL 570.152.

The statute provides notice and is easily comprehended.

In *Michigan* v *Long*, 463 US 1032, 1039; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), this Court stated the test for whether a state court decision rested on adequate and independent state grounds as:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible [*1041] state law ground is not clear from the face of the opinion, we will accept

> as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only [***18] for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

This Court need not review this matter as the Michigan Court of Appeals has decided the matter based on the rationale of *Miller*, *supra*.

Even if this Court were to review the statute, Petitioner's challenge must be examined in light of the facts at hand. The challenge is not valid if raised by one to whom application of the statute is constitutional. *United States* v *Raines*, 362 US 17; 80 S Ct 519; 4 L Ed 2d 524 (1960). Petitioner is exactly the type of person the statute was enacted to protect against.

II.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW DISCRETIONARY ACTS OF THE PROSECUTION OR TRIAL COURT.

Petitioner contends that he could not be charged or convicted of being an unlicensed builder. However, Michigan statutory provisions provide:

> (1) A person shall not engage in or attempt to engage in the practice of an occupation regulated under this act or use a title designated in this act unless the person possesses a license or certification of registration issued by the department for the occupation.
>
> * * *
>
> (3) A person, school, or institution which violates subsection (1) . . . is guilty of a misdemeanor, punishable by a fine of not more than $500.00, or imprisonment for not more than 90 days, or both.
>
> MCL 339.601; MSA 18.425(601).

> "Residential maintenance and alteration contractor" means a person who, for a fixed sum . . . undertakes with another for the . . . laying of concrete on residential property . . . .
>
> MCL 339.2401(b); MSA 18.425(2401)(b).

Petitioner's actions fit the statutory definition.

Petitioner's issues III through VI all involve discretionary acts by the trial court. The decision to admit exhibits and evidence did not violate Petitioner's rights. *People* v *Watkins*, 176 Mich App 428; 440 NW2d 36 (1989); *People* v *Bates*, 91 Mich App 506; 283 NW2d 785 (1979). The directed verdict motion was properly denied as the evidence viewed in a light most favorable to the prosecution would allow a rational trier of fact to find Petitioner engaged in the construction business, that he retained payments meant for the payment of labor, material or subcontractors, while intending to defraud the victims. *People* v *Hampton*, 407 Mich 354; 285 NW2d 284 (1979), cert den 449 US 885 (1990).

Restitution is authorized under MCL 780.766(2). *People* v *Music*, 428 Mich 356; 408 NW2d 795 (1987).

Further, Petitioner has not met the requirements of Rule 14(K)(2) which refers to Rule 33(C) for the printing of briefs. Specifically, 33(C) requires the document to be printed on both sides of the page. Rule 33.7 provides that the clerk shall not accept for filing any document presented in a form not in compliance with this rule.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, the Respondent prays that this Honorable Court issue an order denying Petitioner's petition for a writ of certiorari to the Michigan Court of Appeals.

Respectfully submitted,

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